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<b>WILLIAM E. LUDING, Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 04-1688</b>
	)	<b>Issued: July 14, 2005</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Melville, NY, Employer</b>	)	
	)	

*Case Submitted on the Record*

Before:  
COLLEEN DUFFY KIKO, Judge  
DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge

On June 24, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 17, 2004 which denied modification of an Office decision issued on November 25, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

The issue is whether appellant sustained a recurrence of disability on and after April 26, 2003 causally related to his accepted April 30, 2002 injury.

On April 30, 2002 appellant, then a 45-year-old truck driver, filed a traumatic injury claim alleging that on that day he sustained a right knee injury when he fell off the step of a truck while working. The Office accepted the claim for right knee sprain and strain.

In a duty status report dated August 1, 2002, Dr. Wittaya Payackapan, appellant's treating Board-certified orthopedic surgeon, diagnosed right knee sprain and checked "yes" to questions

on causal relation of appellant's injury sustained when he fell off the step of a truck to his employment. Dr. Payackapan released appellant to return to full duty that day.

On May 28, June 18 and August 11, 2003 appellant filed claims for recurrences of disability for intermittent periods April 26 to July 15, 2003 and July 17, 2003 and continuing, alleging that he was disabled from work as a result of recurrences of his April 30, 2002 work-related injury.<sup>1</sup> The recurrence claims indicated that, following the original injury, there were no changes in appellant's duties.

The employing establishment stated that appellant was on annual leave from April 25 to May 30, 2003 and took four hours of sick leave on May 30, 2003. An employing establishment time sheet dated August 27, 2003 indicates that appellant was on sick leave during May 2003. Further, the employing establishment stated that appellant's pay stopped on May 31, 2003.

In a progress note dated May 16, 2003, Dr. Payackapan requested authorization for a magnetic resonance imaging (MRI) scan and placed appellant on total disability. In a duty status report dated June 5, 2003, he noted appellant's right knee sprain and checked a box "yes" indicating that the injury was caused by the April 30, 2002 injury. Dr. Payackapan advised appellant that he was released to return to work on June 10, 2003 with no restrictions. In a duty status report dated July 7, 2003, he placed appellant on restricted duty with a limitation against twisting. Dr. Payackapan checked a box "yes" indicating that the injury was caused by the June 13, 2003 injury. In a progress note dated the same day, he stated that appellant guarded his right knee, had tenderness in the joint spaces and was painful upon range of motion findings of 0 to 120 degrees. Dr. Payackapan stated that appellant "may work light duty." He reported essentially similar findings in a July 28, 2003 report, noting range of motion of 0 to 100 degrees and restated that appellant could work light duty.

The employing establishment submitted time sheets for appellant covering May 1 to August 23, 2003.<sup>2</sup> On August 1, 2003 appellant filed a claim for compensation from June 18 to August 22, 2003, noting that he was in an LWOP status from May 31 to August 22, 2003.

In a progress note dated August 25, 2003, Dr. Payackapan stated that appellant had persistent and sometimes severe right knee pain. He noted moderate right limp, right knee hypertrophy and moderate tenderness with painful limited range of motion from 0 to 100 degrees. Dr. Payackapan placed appellant on total disability.

By letter dated September 10, 2003, the Office advised appellant regarding the medical and factual evidence needed to support his claim of recurrence of disability based on the

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<sup>1</sup> Appellant incorrectly noted his date of injury as April 15, 2002 in his initial notice of recurrence of disability, but noted April 30, 2002 in subsequent claims. He later clarified his dates of disability which were from April 30 to May 31, from June 5 to 7, from June 13 to 18, from June 21 to 25, from July 5 to 8, from July 10 to 15, and from July 17, 2003 and continuing. Appellant stated that he was on regular duty until June 18, 2003 when limited duty was offered.

<sup>2</sup> Appellant was on sick leave during May 2003 except for days when he was not scheduled to work, he worked 10 days in June and was on leave without pay (LWOP) and sick leave for other days; he worked four days in July and was on LWOP for days he was scheduled to work and was on LWOP during August 2003.

April 30, 2002 work-related injury. The Office asked him to submit a medical report from his doctor which included the dates of all examinations and treatment, history of the recurrences, a detailed description of medical findings before and after the date of recurrences, a firm diagnosis and an opinion, supported by medical rationale, explaining whether and how his present condition was causally related to the April 15, 2002<sup>3</sup> accepted injury. Appellant was also asked to provide the periods of total and partial disability, with restrictions noted.

On June 18, 2003 appellant accepted a limited-duty position effective June 18 to July 18, 2003. In a duty status report dated July 15, 2003, Dr. Payackapan stated that appellant had a right knee sprain and checked a box “yes” indicating that the injury was caused by the April 30, 2002 injury. He noted swelling, tenderness and a torn meniscus and noted restrictions. However, Dr. Payackapan did not release appellant to return to light duty. In a duty status report dated August 1, 2003, he stated that appellant had right knee sprain and checked a box “yes” indicating that the injury was caused by the April 30, 2002 injury but was able to return to full duty.

In an attending physician’s report dated August 27, 2003, Dr. Payackapan stated that appellant had a right knee sprain and a torn meniscus, and checked a box “yes” indicating that the injury was caused by his employment. He found appellant totally disabled from May 30, 2003 to that date.

In a duty status report dated August 27, 2003, Dr. Payackapan stated that appellant had a right knee sprain with swelling and tenderness and a torn meniscus. Although he noted restrictions, he did not release appellant to return to light duty.

On September 5 and 9, 2003 appellant filed claims for compensation from August 30 to September 26, 2003, stating that he was in an LWOP status during that time period.

By decision dated November 25, 2003, the Office denied appellant’s claim for recurrences of disability on April 26, June 13 and July 17, 2003 on the grounds that the evidence failed to demonstrate that the claimed recurrences were causally related to the accepted employment-related injury of April 30, 2002. The Office indicated that appellant failed to submit sufficient factual and medical evidence to support how his condition on the claimed dates was related to his April 30, 2002 injury.

On December 3, 2003 appellant requested reconsideration. In a narrative dated December 12, 2003, appellant stated that he worked a regular schedule at the time of the April 26 and May 31, 2003 recurrences, and was offered limited duty initially on June 18, 2003. His subsequent recurrences were June 13 and 21, 2003. Appellant received medical treatment on July 7, 2003, one day before returning to work. On July 28, 2003 appellant related that his doctor allowed him to return to limited duty in order to earn an income; however, he was advised by the employing establishment that no limited duty was available and he has been off work since July 17, 2003. He alleged that his right knee never healed causing difficulty in performing his job as a tractor-trailer driver.

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<sup>3</sup> See *supra* note 1.

In an attending physician's report dated November 6, 2003, Dr. Payackapan stated that appellant had right knee sprain and a torn right medial meniscus, that he was totally disabled from May 6, 2002 to August 26, 2003, that he was released to return to light work on June 6, 2002, and that he was advised he could return to light duty on July 28, 2003. Dr. Payackapan checked a box "yes" indicating that the injury was caused by his employment. On December 15, 2003 he stated in a progress note that appellant had persistent knee pain, a moderate right and mild left limp, had tenderness and swelling on the right and left knees with a range of motion between 0 and 100 degrees. On January 21, 2004 the Office authorized a right knee MRI scan.

By decision dated May 17, 2004, the Office denied appellant's request for modification based on a merit review of the claim. The Office found that modification of the prior decision was unwarranted as evidence and argument submitted by appellant did not demonstrate "clear evidence of error" by the Office.<sup>4</sup>

### **LEGAL PRECEDENT**

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury.<sup>5</sup> This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.<sup>6</sup> Moreover, the physician's conclusion must be supported by sound medical reasoning.<sup>7</sup>

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.<sup>8</sup> In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.<sup>9</sup> While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.<sup>10</sup>

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<sup>4</sup> The decision was issued initially on April 29, 2004 and reissued on May 17, 2004.

<sup>5</sup> *Robert H. St. Onge*, 43 ECAB 1169 (1992).

<sup>6</sup> Section 10.104 of the Code of Federal Regulations provides that when an employee has received medical care as a result of the recurrence, he or she should arrange for the attending physician to submit a detailed medical report. The physician's report should include the physician's opinion with medical reasons regarding the causal relationship between the employee's condition and the original injury, any work limitations or restrictions and the prognosis. 20 C.F.R. § 10.104.

<sup>7</sup> *Robert H. St. Onge*, *supra* note 5.

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

<sup>9</sup> For the importance of bridging information in establishing a claim for a recurrence of disability, see *Robert H. St. Onge*, *supra* note 5; *Shirloyn J. Holmes*, 39 ECAB 938 (1988); *Richard McBride*, 37 ECAB 748 (1986).

<sup>10</sup> *Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

## ANALYSIS

The Office's May 12, 2004 decision on appellant's reconsideration request is not consistent with regard to the basis upon which the decision was rendered. On one hand, the decision indicates that the Office considered the evidence and argument submitted by appellant but denied modification of the prior decision. Generally, an Office decision denying modification of a prior decision indicates that the Office conducted a merit review of the claim.<sup>11</sup> However, the Office's decision also indicated that it denied modification of the November 25, 2003 decision because appellant had not demonstrated "clear evidence of error." "Clear evidence of error" is the standard review for determining whether evidence or argument submitted with an untimely reconsideration request is sufficient to require the Office to conduct a merit review of the claim.<sup>12</sup>

On November 25, 2003 the Office issued a merit decision with respect to appellant's claim for a recurrence of disability. Appellant therefore had one year from that date to file a timely request for reconsideration of his claim. He filed a request for reconsideration on December 3, 2003, which was within the one-year time limitation from the November 25, 2003 Office decision. Since the reconsideration request was timely, the Office must evaluate the reconsideration request under the appropriate standard for a timely reconsideration request.<sup>13</sup> However, the Office's May 17, 2004 decision, while denying "modification" of the prior decision, cited the standard appropriate for an untimely filed request for reconsideration which requires that appellant demonstrate clear evidence of error in the Office's prior decision, in this case, the November 25, 2003 decision. The Office's decision did not attempt to explain this inconsistency. Since the reconsideration request was timely, the Office must evaluate the reconsideration request under the appropriate standard for timely reconsideration requests. The "clear evidence of error" standard utilized in this case is appropriate only for reconsideration requests that are untimely. Accordingly, the case will be remanded to the Office for proper consideration of appellant's timely request for reconsideration.<sup>14</sup> After such further development as it deems necessary, it should issue an appropriate decision.

## CONCLUSION

Since the Office evaluated appellant's timely reconsideration request under the wrong standard the May 17, 2004 decision of the Office will be reversed and the case will be remanded to the Office for proper consideration of appellant's timely request for reconsideration.

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<sup>11</sup> See *Robert B. Chada*, 41 ECAB 554 (1990); *Clara Anne Andresen*, 5 ECAB 42 (1952). See also 20 C.F.R. § 10.609.

<sup>12</sup> See 20 C.F.R. § 10.607(b). See also *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>13</sup> 20 C.F.R. § 10.606(b).

<sup>14</sup> See *Robbin Bills*, 45 ECAB 784 (1994).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17, 2004 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further proceedings consistent with this decision of the Board.

Issued: July 14, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board